

No. 15993

United States
Court of Appeals
for the Ninth Circuit

GERTRUDE L. BRAWNER,

Appellant,

vs.

PEARL ASSURANCE COMPANY, LTD., et al.,

Appellee.

Transcript of Record

Appeal from the United States District Court for the
Southern District of California
Central Division

FILED

MAY 22 1958

PAUL P. O'BRIEN, CLERK

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

For Appellant:

WILLIAM H. BRAWNER,
ERNEST W. PITNEY,
639 So. Spring Street,
Los Angeles 14, California.

For Appellee:

McBAIN & MORGAN,
ANGUS C. McBAIN,
639 So. Spring Street,
Los Angeles 14, California.

In the District Court of the United States for the
Southern District of California, Central Division

No. 989-57 HW

GERTRUDE L. BRAWNER,

Plaintiff,

vs.

PEARL ASSURANCE COMPANY, LIMITED, a
Corporation; JOHN DOE, RICHARD ROE,
DOE ONE TO TWENTY, Inclusive; BLACK
& WHITE COMPANY, a Corporation,

Defendants.

PETITION FOR REMOVAL OF CAUSE TO
UNITED STATES DISTRICT COURT

To the Honorable, the District Court of the United
States, for the Southern District of California,
Central Division:

The petition of defendant, Pearl Assurance Company, Limited, a corporation, respectfully shows:

I.

That the above-entitled cause is a suit of a civil nature at law over which the District Court of the United States has original jurisdiction, and that said action has been commenced and is now pending in the Superior Court of the State of California, in and for the County of Los Angeles.

II.

That the plaintiff, Gertrude L. Brawner, was at the time [2*] of the commencement of the foregoing action and ever since has been and is now a citizen and resident of the State of California, residing in Los Angeles County therein.

III.

That defendant, Pearl Assurance Company, Limited, a corporation, was at the time of the commencement of the foregoing action and ever since has been and is now a corporation, duly organized and existing under the laws of England in the Kingdom of Great Britain, with its principal place of business in the City of London, England, and is, was and has been at all times a citizen, resident and subject of England and a non-resident of the State of California.

IV.

That the above-entitled action has not been tried nor has the time allowed the defendant, Pearl Assurance Company, Limited, by the laws of the United States or of the State of California, or by the rules of this Court, in which to answer or plead to the complaint of plaintiff, or otherwise, expired, and that your petitioner has not yet appeared in this action.

V.

That the cause of action attempted to be alleged

*Page numbering appearing at foot of page of original Certified Transcript of Record.

against this petitioning defendant in the complaint filed by the plaintiff involves a controversy which is wholly between citizens of different states, to wit, between plaintiff, a citizen and resident of the State of California, and this petitioning defendant, a citizen and resident of England in the Kingdom of Great Britain; that the plaintiff sues this petitioning defendant upon a policy of insurance and prays judgment in the total sum of \$7,650.00, with interest at 7% per annum from March 5, 1957. That the amount in dispute or controversy in said action as between plaintiff and this petitioning defendant exceeds, exclusive of interest and costs, the sum and value of \$3,000.00; that this petitioning defendant disputes said claim and demand and will defend the same. [3]

VI.

That the foregoing cause was commenced in the Superior Court of the State of California, in and for the County of Los Angeles, on July 10, 1957, by the plaintiff filing with the Clerk of said court a complaint in said action and causing summons to be issued directed to this petitioning defendant and to the fictitious defendants; that to the knowledge of petitioner no defendant other than this petitioning defendant has been served; that plaintiff caused a copy of the initial pleading herein, to wit, the complaint and of the summons thereon to be served on petitioner on July 26, 1957, by delivery on said date to its office in the City and County of San

Francisco, State of California, of a copy of said summons and complaint.

VII.

That the foregoing cause involves a separable controversy wholly and solely between the plaintiff and this petitioning defendant, who are the only indispensable or necessary parties thereto; that the fictitiously named defendants are mere nominal parties, having no interest in said controversy and against whom no cause of action has been alleged or attempted to be alleged by plaintiff.

VIII.

That your petitioner herewith presents and files a bond with good and sufficient surety, conditioned that this defendant will pay all costs and disbursements incurred by reason of the removal proceedings if it be determined that the cause was not removable or was improperly removed, and also files herewith a copy of all processes and pleadings served upon it and contained in the aforesaid Superior Court file.

IX.

That your petitioner desires said action be removed from the Superior Court of the State of California, in and for the County of Los Angeles, into the District Court of the United States, for [4] the Southern District of California, Central Division, and prays that the aforesaid bond be approved and accepted and that said cause be removed.

Dated this 13th day of August, 1957.

PEARL ASSURANCE COMPANY, LIMITED,
A CORPORATION,

By /s/ ANGUS C. McBAIN,
Attorney for Said Petitioner.

Duly verified. [5]

In the Superior Court of the State of California in
and for the County of Los Angeles

No. 682787

GERTRUDE L. BRAUNER,

Plaintiff,

vs.

PEARL ASSURANCE COMPANY, LIMITED, a
Corporation; JOHN DOE, RICHARD ROE,
DOE ONE TO TWENTY, Inclusive; BLACK
& WHITE COMPANY, a Corporation,

Defendants.

SUMMONS

The People of the State of California Send Greetings to:

Pearl Assurance Company, Limited, a Corporation; John Doe, Richard Roe, Doe One to Twenty, Inclusive; Black & White Company, a Corporation, Defendants.

You are directed to appear in an action brought against you by the above-named plaintiff in the Superior Court of the State of California, in and for the County of Los Angeles, and to answer the Complaint therein within ten days after the service on you of this Summons, if served within the County of Los Angeles, or within thirty days if served elsewhere, and you are notified that unless you appear and answer as above required, the plaintiff will take judgment for any money or damages demanded in the Complaint, as arising upon contract, or will apply to the Court for any further relief demanded in the Complaint.

Given under my hand and seal of the Superior Court of the County of Los Angeles, State of California, this 10th day of July, 1957.

[Seal] HAROLD J. OSTLY,
County Clerk and Clerk of the Superior Court of
the State of California, in and for the County
of Los Angeles;

By /s/ A. H. AVERY,
Deputy. [7]

In the Superior Court of the State of California in
and for the County of Los Angeles

No. 682787

GERTRUDE L. BRAWNER,

Plaintiff,

vs.

PEARL ASSURANCE COMPANY, LIMITED, a
Corporation; JOHN DOE, RICHARD ROE,
DOE ONE TO TWENTY, Inclusive; BLACK
& WHITE COMPANY, a Corporation,

Defendants.

COMPLAINT FOR RECOVERY FOR FIRE
UNDER POLICY OF INSURANCE ISSUED
TO PLAINTIFF

Plaintiff complains of defendants and states:

I.

That defendants John Doe, Richard Roe, Doe One to Twenty, inclusive; Black & White Company, a corporation, are sued herein by their fictitious names; their true names and capacities are unknown to plaintiff at this time and plaintiff will ask leave of court to amend its complaint and insert their true names and capacities when same are ascertained.

II.

On the 22nd day of October, 1955, defendant Pearl Assurance Company, Limited, a corporation, for a

consideration, issued to plaintiff its policy of insurance No. D 11 52238, a copy of which is attached hereto marked Exhibit "A" for identification and made a part hereof as though set forth herein in full. Thereafter, [8] from time to time, for a consideration, defendant continued said policy in full force and effect up to and including the 22nd day of October, 1958, agreeing to pay for loss by fire to the limit thereof, to wit, the sum of \$7,500.00, together with loss of rental and other covenants as in said policy set forth.

III.

On or about the 4th day of February, 1957, plaintiff was the owner of those certain premises known 125-127-127½ South Bunker Hill Avenue, Los Angeles, California, on which date said property was totally destroyed by fire.

IV.

That prior to the filing hereof, to wit, on or about the 5th day of February, 1957, plaintiff duly reported said loss to said defendant and demanded that they pay said loss as provided in said policy but defendants have failed and refused and now fail and refuse to pay said loss or any part thereof, and there is now due, owing and unpaid to plaintiff from defendants the sum of \$7,500.00, together with interest thereon at the rate of 7% per annum from the 5th day of March, 1957, until paid, together with loss of rentals in the sum of \$150.00.

V.

The loss sustained by plaintiff is covered under the terms of said policy of insurance.

Wherefore, plaintiff demands judgment against defendants in the sum of \$7,500.00, together with interest thereon at the rate of 7% per annum from the 5th day of March, 1957, until paid, together with the sum of \$150.00 loss of rentals, and for costs of suit herein incurred.

Dated: This 8th day of July, 1957.

/s/ WILLIAM H. BRAWNER,
Attorney for Plaintiff.

Duly verified [9]

EXHIBIT A

STANDARD FORMS BUREAU FORM 16-A (JAN. 1948)

ASSIGNMENT (PROVISIONAL) OF POLICY (ACTUAL SALE AND TRANSFER OF PROPERTY)

GERTRUDE L. BRAUNER, a married woman

whose address is _____
hereinafter termed "Transferee") is hereby recognized as the insured under the below-numbered policy in place and stead of
W. H. BRAUNER, a married man
subject to all the terms and conditions of said policy.

THE TRANSFEEE BY ACCEPTANCE OF THIS ENDORSEMENT WARRANTS AND AGREES:

(A) THAT THE TRANSFEEE HAS OBTAINED TITLE TO THE PROPERTY DESCRIBED IN AND INSURED UNDER SAID POLICY; AND

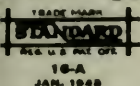
(B) THAT THE TRANSFEEE WILL, UPON DEMAND, PAY TO THE COMPANY BELOW-NAMED ALL PREMIUMS UNDER SAID POLICY NOW DUE OR WHICH MAY HEREAFTER BECOME DUE.

Attached to Policy No. 11 52238 of the PEARL ASSURANCE CO.
NAME OF COMPANY

issued to W. H. BRAUNER

Agency at LOS ANGELES, CALIF.

Dated 11-3-55



11-9-55 at

LINKERSHIM CENTER COMPANY

BY D. C. Wright Agent

GENERAL CHANGE ENDORSEMENT

General Liability or Compensation

Automobile

Additional Premium \$			Return Premium \$		Additional Premium \$	
Return Premium \$			A	F	A	F
Cov.	Cov.	Cov.	C	G	C	G
—\$			B	H	B	H
v. —\$			D	I	D	I
iv. —\$			E	J	E	J

End No.

It is agreed that item # 1 of the policy declarations
is amended to read:

Gertrude L. Brauner

Nothing herein contained shall be held to vary, alter, waive or extend any of the terms, conditions, agreements or limitations of the policy or any endorsement attached thereto, except as herein set forth.

This endorsement shall become effective November 3, 1955
at 12:01 A. M., but shall not be valid until countersigned by a duly authorized representative of the company.

Attached to and forming part of policy No. LSO 369009 of the NEW AMSTERDAM CASUALTY COMPANY,
W. H. Brauner

11-8-55 zk

Counterigned by LINKERSHIM CENTER COMPANY

BY D. C. Wright
2201-B-100 100m-7-55

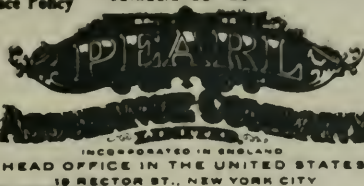
J. B. Mahon President
Shirley Lane Secretary

Morris Standard Form Fire Insurance Policy
DWELLING FORM

ESTABLISHED 1884

STOCK COMPANY

PACIFIC DEPARTMENT



No. D 11. 52238

Agency **LOS ANGELES**

Replating No **939253**

SAN FRANCISCO CALIFORNIA

Lankershim Center Company
INSURANCE

ALLIANCE VICE PRES

PHONE RI 7 6528

Expires

OCTOBER 22, 1958

Named Insured

W. H. BRAUNER

Location

LOS ANGELES, CALIF.

AND
NING \$ **7500.00**
ENDED COVERAGE

RATE	.25	PREMIUM \$	18.75
RATE	.10	PREMIUM \$	7.50
RATE		PREMIUM \$	
RATE		PREMIUM \$	
TOTAL PREMIUM \$		26.25	

INSURANCE UNDER "OTHER PERILS AND COVERAGES" ATTACHES ONLY FOR SPECIFIED PERILS OR COVERAGES AS TO WHICH (A) RATE AND PREMIUM ARE SHOWN IN THE SPACES TO THE RIGHT OF THE DESIGNATION OF SUCH PERIL OR COVERAGE AND (B) WRITTEN ENDORSEMENT IN REFERENCE THERETO IS MADE A PART OF THIS POLICY

Consideration of the Provisions and Stipulations Herein or Added Hereto and of the Above Specified Dollars Premium this Company, term of **THREE YEARS** from **OCTOBER 22, 1955** to **OCTOBER 22, 1958** at noon, } Standard Time, at noon, }

ation of property involved, to an amount not exceeding the above specified dollars, does insure

W. H. BRAUNER, A MARRIED MAN

legal representatives, to the extent of the actual cash value of the property at the time of loss, but not exceeding the amount which it cost to repair or replace the property with material of like kind and quality within a reasonable time after such loss, without allowance for increased cost of repair or reconstruction by reason of any ordinance or law regulating construction or repair, and without compensation for loss resulting from interruption of business or manufacture, nor in any event for more than the interest of the insured, against all **BY FIRE, LIGHTNING AND BY REMOVAL FROM PREMISES ENDANGERED BY THE PERILS INSURED AGAINST IN THIS POLICY, EXCEPT AS HEREIN PROVIDED.** to the property described hereinafter while located or contained as described in this policy, or pro rata for five days at each place to which any of the property shall necessarily be removed for preservation from the perils insured against in this policy, but not here.

ated:

125-127-127½ SOUTH BUNKER HILL AVENUE
LOS ANGELES, CALIFORNIA

State of California

*Item I. \$ **7500.00**

ON the **COMP**

roof

FRAME

building, containing

family unit(s)

*Item II. \$ **NIL**

ON household furniture and personal property.

CONSTRUCTION

building.

*Item III. \$

ON the **DOOR COVERING**

roof

CONSTRUCTION

*Item IV. \$ **NIL**

ON trees, shrubs, and plants.

DESCRIPT

*Item V. \$ **X**

ON rental value.

*Item VI. \$ **NIL**

ON additional living expenses.

*Item VII. \$

ON

DESCRIPT

none attaches heretofore only to those items for which an amount is shown in the space provided therefor and for not exceeding said amount under such item, and subject to the (s) and endorsement(s) attached.

FOR COMPANY INFORMATION

No. (s)

SF 184NS 7-55

attached.

INSERT FROM NUMBERED AND EDITION CATALOG

any, if any, shall be adjusted with the Insured specifically named, unless otherwise specified by, (a) written agreement, or (b) endorsement hereto. Subject to all the terms and conditions of this policy and to the written agreement, if any, between this Insurer and the following named Payee: loss if any, under Item I and Item II shall be

ASSURED

WHOSE MAILING ADDRESS IS

Assignment of this policy shall not be valid except with the written consent of this Company.

This policy is made and accepted subject to the foregoing provisions and stipulations and those hereinafter stated, which are hereby agreed to by the Insured, together with such other provisions, stipulations and agreements as may be provided in the policy.

terigned at

LOS ANGELES, CALIF., 9-19-55 LC

LANKERSHIM CENTER COMPANY

BY **D. C. Wright** Agent

U S Manager

PROVISIONS REFERRED TO IN AND MADE PART OF THIS FORM (No. 1848N)

ELECTRICAL APPARATUS CLAUSE: IF ELECTRICAL APPLIANCES OR DEVICES (INCLUDING WIRING) ARE COVERED UNDER THIS POLICY, THIS COMPANY SHALL NOT BE LIABLE FOR ANY ELECTRICAL INJURY OR DISRUPTANCE TO THE SAID ELECTRICAL APPLIANCES OR DEVICES (INCLUDING WIRING) CAUSED BY ELECTRICAL CURRENTS ARTIFICIALLY GENERATED UNLESS FIRE ENSUES, AND IF FIRE DOES ENSUE THIS COMPANY SHALL BE LIABLE ONLY FOR ITS PROPORTION OF LOSS CAUSED BY SUCH ENSUING FIRE.

CAUTION

THE FOLLOWING EXTENDED COVERAGE (E. C.) IS EFFECTIVE AND A PART OF THIS POLICY ONLY WHEN A PREMIUM THEREFOR IS SEPARATELY CHARGED AND SHOWN ON THE FIRST PAGE OF THIS POLICY UNDER "OTHER PERILS AND COVERAGES". WHEN THIS EXTENDED COVERAGE IS PURCHASED, THE INSURED SHOULD SECURE LIKE COVERAGE ON ALL FIRE POLICIES COVERING THE PROPERTY COVERED HEREUNDER.

15. EXTENDED COVERAGE (E. C.)

(Perils of Windstorm, Hail, Explosion, Riot, Riot Attending a Strike, Civil Commotion, Aircraft, Vehicles, Smoke, Except as Hereinafter Provided.)

In consideration of the premium for this coverage above on the first page of this policy, and subject to provisions and stipulations hereinafter referred to as "provisions") hereto and is the policy to which this Extended Coverage is attached, including riders and endorsements thereon, the coverage of this policy is extended to include direct loss by WINDSTORM, HAIL, EXPLOSION, RIOT, RIOT ATTENDING A STRIKE, CIVIL COMMOTION, AIRCRAFT, VEHICLES AND SMOKE. THIS EXTENDED COVERAGE DOES NOT INCREASE THE AMOUNT OR AMOUNTS OF INSURANCE PROVIDED IN THIS POLICY.

If this policy covers two or more items, the provisions of this Extended Coverage shall apply to each item separately.

SUBSTITUTION OF TERMS: In the application of the provisions of this policy, including riders and endorsements (but not this Extended Coverage), to the perils covered by this Extended Coverage, wherever the word "fire" appears there shall be substituted therefor the peril involved or the loss caused thereby, as the case requires.

APPORTIONMENT CLAUSE: THIS COMPANY SHALL NOT BE LIABLE FOR A GREATER PROPORTION OF ANY LOSS FROM ANY PERIL OR PERILS INCLUDED IN THIS EXTENDED COVERAGE THAN (1) THE AMOUNT OF INSURANCE UNDER THIS POLICY BEARS TO THE WHOLE AMOUNT OF FIRE INSURANCE COVERING THE PROPERTY, WHETHER COLLECTIBLE OR NOT, AND WHETHER OR NOT SUCH OTHER FIRE INSURANCE COVERS AGAINST THE ADDITIONAL PERIL OR PERILS INCLUDED HEREUNDER; (2) NOR FOR A GREATER PROPORTION THAN THE AMOUNT HEREBY INSURED BEARS TO ALL INSURANCE, WHETHER COLLECTIBLE OR NOT, COVERING IN ANY MANNER SUCH LOSS; EXCEPT IF ANY TYPE OF INSURANCE OTHER THAN FIRE WITH EXTENDED COVERAGE OR WINDSTORM INSURANCE APPLIES TO ANY LOSS TO WHICH THIS INSURANCE ALSO APPLIES, THE LIMIT OF LIABILITY OF EACH TYPE OF INSURANCE FOR SUCH LOSS, HEREBY DESIGNATED AS "JOINT LOSS", SHALL FIRST BE DETERMINED AS IF IT WERE THE ONLY INSURANCE, AND THIS TYPE OF INSURANCE SHALL BE LIABLE FOR NO GREATER PROPORTION OF JOINT LOSS THAN THE LIMIT OF ITS LIABILITY FOR SUCH LOSS BEARS TO THE SUM OF ALL SUCH LIMITS. THE LIMIT OF LIABILITY OF THIS COMPANY UNDER THIS EXTENDED COVERAGE FOR SUCH JOINT LOSS SHALL BE LIMITED TO ITS PROPORTIONATE PART OF THE AGGREGATE LIMIT OF THIS AND ALL OTHER INSURANCE OF THE SAME TYPE.

THE WORDS "JOINT LOSS," AS USED IN THE FOREGOING, MEAN THAT PORTION OF THE LOSS IN EXCESS OF THE HIGHEST DEDUCTIBLE, IF ANY, TO WHICH THIS EXTENDED COVERAGE AND OTHER TYPES OF INSURANCE ABOVE REFERRED TO BOTH APPLY.

WAR RISK EXCLUSION CLAUSE: THIS COMPANY SHALL NOT BE LIABLE FOR LOSS CAUSED DIRECTLY OR INDIRECTLY BY (a) HOSTILE OR WARLIKE ACTION IN TIME OF PEACE OR WAR, INCLUDING ACTION IN HINDERING, COMBATING OR REFUSING AGAINST AN ACTUAL, BELIEVED OR SUSPECTED ACT OF WAR; (b) BY ANY GOVERNMENT OR SUBVERSIVE POWER (DE JURE OR DE FACTO) OR BY ANY AUTHORITY MAINTAINING OR USING MILITARY, POLICE OR AIR FORCES; OR (c) BY MILITARY, NAVAL OR AIR FORCES; OR (3) BY AN AGENT OF ANY SUCH GOVERNMENT, POWER, AUTHORITY OR FORCES, IT BEING UNDERSTOOD THAT ANY DISCHARGE, EXPLOSION OR USE OF ANY WEAPON OF WAR EMPLOYING ATOMIC FISSION OR RADIO ACTIVE FORCE SHALL BE CONCLUSIVELY PRESUMED TO BE SUCH A HOSTILE OR WARLIKE ACTION BY SUCH A GOVERNMENT, POWER, AUTHORITY OR FORCES; (d) INSURRECTION, REBELLION, REVOLUTION, CIVIL WAR, USURPED POWER, OR ACTION TAKEN BY GOVERNMENTAL AUTHORITY IN HINDERING, COMBATING OR DEFENDING AGAINST SUCH AN OCCURRENCE.

WAIVER OF POLICY PROVISIONS: A claim for loss from perils included in this Extended Coverage shall not be barred because of change of occupancy, nor because of vacancy or unoccupancy.

FOUNDATIONS, EXCAVATIONS, ARCHITECTS FEES AND EXCLUSIONS: If this policy covers a building, it shall cover direct loss by the perils insured against in this Extended Coverage to foundations, excavations, architect's fees, and all other portions of said building, even though this Company by this policy may have excluded foundations, excavations, architect's fees and such portions of said building from coverage against loss by fire.

The value of the portion or portions of said building as excluded from coverage against loss by fire shall not be considered in the determination of actual cash value when applying any Co-insurance, Average, Distribution or Reduced Rate Contribution Clause forming a part of this policy.

PROVISIONS APPLICABLE ONLY TO WINDSTORM AND HAIL: THIS COMPANY SHALL NOT BE LIABLE FOR LOSS CAUSED DIRECTLY OR INDIRECTLY BY COLD WEATHER OR COLD WIND (LESS THAN HAIL), SNOWSTORM, SLEET, WAVES, TIDAL WAVE, HIGH WATER OR OVERFLOW, WHETHER DRIVEN BY WIND OR NOT.

THIS COMPANY SHALL NOT BE LIABLE FOR LOSS TO THE INTERIOR OF THE BUILDING OR THE PROPERTY COVERED THEREIN CAUSED, (a) BY WATER, RAIN, SNOW, SAND OR DUST, WHETHER DRIVEN BY WIND OR NOT, UNLESS THE BUILDING COVERED OR CONTAINING THE PROPERTY COVERED SHALL FIRST SUSTAIN AN ACTUAL DAMAGE TO ROOF OR WALLS BY THE DIRECT FORCE OF WIND OR HAIL, AND THEN SHALL BE LIABLE FOR LOSS TO THE INTERIOR OF THE BUILDING OR THE PROPERTY COVERED THEREIN AS MAY BE CAUSED BY DIRECT RAIN, SNOW, SAND OR DUST ENTERING THE BUILDING THROUGH OPENINGS IN THE ROOF OR WALLS MADE BY DIRECT ACTION OF WIND OR HAIL, OR BY WATER FROM A SPRINKLER EQUIPMENT OR OTHER PIPING, UNLESS SUCH EQUIPMENT OR PIPING BE DAMAGED AS A DIRECT RESULT OF WIND OR HAIL.

THIS COMPANY SHALL NOT BE LIABLE FOR LOSS TO THE FOLLOWING PROPERTY: (1) HAY, STRAW AND FODDER, ALL ONLY WHILE UNBALED AND LOCATED OUTSIDE OF BUILDING(S); OR (2) CROPPING CROPS, WHEREVER LOCATED.

PROVISIONS APPLICABLE ONLY TO EXPLOSION: LOSS BY EXPLOSION SHALL INCLUDE DIRECT LOSS RESULTING FROM THE EXPLOSION OF ACCUMULATED GASES OR UNCONSUMED FUEL WITHIN THE FIREBOX (OR THE COMBUSTION CHAMBER OF ANY FIRE VESSEL OR WITHIN THE FLUES OR PASSAGES WHICH CONDUCT THE GASES OF COMBUSTION THEREFROM, BUT THIS COMPANY SHALL NOT BE LIABLE FOR LOSS BY EXPLOSION OF BOILING OR BURNING OF STEAM BOILERS, STEAM PIPES, STEAM TURBINES, STEAM ENGINES OR ROTATING PARTS OF MACHINES OR MACHINERY, OWNED, OPERATED OR CONTROLLED BY THE INSURED OR LOCATED IN THE BUILDING(S) DESCRIBED IN THIS POLICY.

ELECTRICAL ARCING, WATER HAMMER, AND THE BURSTING OF WATER PIPES ARE NOT EXPLOSIONS WITHIN THE INTENT OR MEANING OF THESE PROVISIONS.

ANY OTHER EXPLOSION CLAUSE MADE A PART OF THIS POLICY IS SUPERSEDED BY THIS EXTENDED COVERAGE.

PROVISIONS APPLICABLE ONLY TO RIOT, RIOT ATTENDING A STRIKE AND CIVIL COMMOTION: Loss by riot, riot attending a strike or civil commotion shall include direct loss by the use of striking or riotous weapons, whether or not while occupied by said striking employees and shall also include direct loss from pillage and looting occurring during and at the immediate place of a riot, riot attending a strike or civil commotion. UNLESS SPECIFICALLY EXCLUDED HEREON IN WRITING, THIS COMPANY SHALL NOT BE LIABLE, HOWEVER, FOR LOSS RESULTING FROM DAMAGE TO OR DESTRUCTION OF THE DESCRIBED PROPERTY OWING TO CHANGE IN TEMPERATURE OR INTERRUPTION OF OPERATIONS WHETHER OR NOT SUCH LOSS IS COVERED BY THIS POLICY AS TO OTHER PERILS.

PROVISIONS APPLICABLE ONLY TO LOSS BY AIRCRAFT AND VEHICLES: Loss by aircraft includes direct loss by objects falling therefrom. THE TERM "VEHICLES," AS USED IN THIS EXTENDED COVERAGE, MEANS VEHICLES OF ALL DESCRIPTIONS ON TRACKS BUT NOT AIRCRAFT. THIS COMPANY SHALL NOT BE LIABLE, HOWEVER, FOR LOSS (a) BY ANY VEHICLE OWNED OR OPERATED BY THE INSURED OR BY ANY TENANT OF THE DESCRIBED PREMISES; (b) BY ANY VEHICLE TO FENCES, DRIVEWAYS, WALKS OR LAWNS; (c) TO ANY AIRCRAFT OR VEHICLE INCLUDING CONTENTS THEREOF OTHER THAN STOCKS OF AIRCRAFT OR VEHICLES IN PROCESS OF MANUFACTURE OR FOR SALE.

PROVISIONS APPLICABLE ONLY TO SMOKE: THE TERM "SMOKE," AS USED IN THIS EXTENDED COVERAGE, MEANS ONLY SMOKE DUE TO A SUDDEN, UNUSUAL AND FAULTY OPERATION OF ANY HEATING OR COOKING UNIT, ONLY WHEN SUCH UNIT IS CONNECTED TO THE DESCRIBED BUILDING AND WHILE IN OR ON THE PREMISES DESCRIBED IN THIS POLICY, EXCLUDING, HOWEVER, SMOKE FROM FIREPLACES OR INDUSTRIAL APPARATUS.

PROVISIONS APPLICABLE ONLY WHEN THIS EXTENDED COVERAGE IS ATTACHED TO A POLICY COVERING ADDITIONAL LIVING EXPENSE, RENT, LEASEHOLD INTEREST, OR CONSEQUENTIAL LOSS: WHEN THIS EXTENDED COVERAGE IS ATTACHED TO A POLICY COVERING ADDITIONAL LIVING EXPENSE, RENTS, LEASEHOLD INTEREST, OR CONSEQUENTIAL LOSS, THE TERM "DIRECT," AS APPLIED TO LOSS, MEANS LOSS, AS LIMITED AND CONDITIONED IN SUCH POLICY, RESULTING FROM DIRECT LOSS TO DESCRIBED PROPERTY FROM PERILS INSURED AGAINST, AND WHILE THE BUSINESS OF THE OWNER OR TENANT(S) OF THE DESCRIBED BUILDING IS INTERRUPTED BY A STRIKE AT THE DESCRIBED LOCATION, THIS COMPANY SHALL NOT BE LIABLE FOR ANY LOSS OWING TO INTERFERENCE BY ANY PERSON(S) WITH REBUILDING, REPAIRING OR REPLACING THE PROPERTY DAMAGED OR DESTROYED OR WITH THE RESUMPTION OR CONTINUATION OF BUSINESS.

[Title of District Court and Cause.]

NOTICE OF FILING OF PETITION FOR RE-
MOVAL OF CAUSE TO UNITED STATES
DISTRICT COURT, AND OF BOND AND
CERTIFICATION

To the Plaintiff, Gertrude L. Brawner, and to Wil-
liam H. Brawner, Her Attorney:

You and Each of You Will Please Take Notice that on the 14th day of August, 1957, and prior to the service of this notice, the defendant herein, Pearl Assurance Company, Limited, a corporation, filed its petition for removal of the above-entitled cause to the District Court of the United States, for the Southern District of California, Central Division, together with a bond with good and sufficient surety, conditioned that the defendant, Pearl Assurance Company, Limited, a corporation, will pay all costs and disbursements incurred by reason of the removal proceedings should it be determined that the cause was not removable or was [12] improperly removed, together with a copy of all processes and pleadings served upon said defendant in such action. A true copy of said petition and said bond are served with this notice.

Dated at Los Angeles, California, this 14th day of August, 1957.

ANGUS C. McBAIN,
McBAIN & MORGAN,

By /s/ ANGUS C. McBAIN,
Attorneys for Said
Defendant.

Certification

I, Angus C. McBain, one of the attorneys for the defendant, Pearl Assurance Company, Limited, a corporation, hereby certify that on the 14th day of August, 1957, after filing said Petition for Removal in the District Court of the United States, for the Southern District of California, Central Division, I filed with the Clerk of the Superior Court of the State of California, in and for the County of Los Angeles, in cause No. 682787 of said Court, a true copy of said defendant's said Petition for Removal of said cause No. 682787 to the District Court of the United States, for the Southern District of California, Central Division.

Dated at Los Angeles, California, this 14th day of August, 1957.

/s/ ANGUS C. McBAIN.

Affidavit of Service by Mail attached.

[Endorsed]: Filed August 14, 1957. [13]

[Title of District Court and Cause.]

ANSWER

Comes now the defendant, Pearl Assurance Company, Limited, a corporation, and answering the complaint herein for itself only:

I.

As to Paragraph II, admits this defendant issued its policy of insurance No. D 11 52238 to plaintiff

in consideration of premium payments and that its said policy in the sum issued and endorsed was in force and effect at the time of the fire referred to in the complaint. Defendant admits that Exhibit "A" is a true copy of its policy except that it denies the endorsement captioned "General Change Endorsement" was issued by this defendant or that it was ever in whole or in part included in defendant's policy. Defendant denies that its policy provided for payment or indemnification [15] of plaintiff for any loss or losses in excess of an aggregate of \$7,500.00, and denies all allegations contained in said Paragraph II not herein specifically admitted.

II.

As to Paragraph III, alleges it has no information or belief on the subject sufficient to enable it to answer and upon that ground denies the same and each and every allegation therein contained.

III.

As to Paragraph IV, defendant admits plaintiff reported the fire involving her alleged property and demanded the sum of \$7,500.00; admits this defendant has refused and continues to refuse to pay the loss claimed or alleged by plaintiff or any part thereof, except for plaintiff's loss of rentals in an amount not exceeding the policy coverage, for which defendant admits liability and hereby tenders payment; defendant denies each and every allegation contained in said Paragraph IV not herein admitted or otherwise specifically denied: denies that there

is now or ever was due, owing or unpaid to plaintiff from defendant the sum of \$7,500.00 or any other sum or interest on said or any sum at the rate of 7% per annum or at any rate or for any period of time.

IV.

As to Paragraph V, defendant denies that the loss sustained by plaintiff as alleged in the complaint or at all is covered under the terms of defendant's policy except for the loss of rentals in the sum of \$150.00 alleged by plaintiff which defendant admits, has offered to pay and hereby offers to pay in full settlement of plaintiff's claims.

As a First, Separate and Affirmative Defense to the Complaint, This Answering Defendant [16] Alleges:

I.

That plaintiff suffered no loss by reason of the fire referred to in her complaint in that the entire property located at 125-127-127½ South Bunker Hill Avenue, Los Angeles, California, including the improvements thereon which were the subject of defendant's insurance policy, were in the process of being condemned by the County of Los Angeles at the time of said fire by condemnation suit No. 658447 then pending in the Superior Court of the State of California, in and for the County of Los Angeles, and within approximately sixty days after said fire said condemnation was completed by judgment in said Superior Court action and plaintiff was awarded and received the full value of said prop-

erty in its condition immediately before the said fire and without diminution because of the physical damage caused by said fire.

Wherefore, this answering defendant prays that plaintiff take nothing by her complaint on file herein and that it go hence with its costs, and for such other relief as appears meet and proper.

ANGUS C. McBAIN,
McBAIN & MORGAN,

By /s/ ANGUS C. McBAIN,
Attorneys for Answering
Defendant.

Duly verified.

Affidavit of Service by Mail attached.

[Endorsed]: Filed August 14, 1957. [17]

[Title of District Court and Cause.]

NOTICE OF MOTION FOR
SUMMARY JUDGMENT

To the Plaintiff, Gertrude L. Brawner, and to William L. Brawner, Her Attorney:

Please Take Notice that the defendant, Pearl Assurance Company, Limited, will bring the within Motion for Summary Judgment on for hearing before this Honorable Court in Courtroom 5 of the Honorable Harry Westover, Judge of said Court,

[Title of District Court and Cause.]

PLAINTIFF'S NOTICE OF MOTION
FOR SUMMARY JUDGMENT

To the Defendant, Pearl Assurance Company, Limited, a Corporation, and to Angus McBain and McBain & Morgan, Its Attorneys:

Please Take Notice that plaintiff, Gertrude L. Brawner, will bring the within Motion for Summary Judgment on for hearing before the hereinabove court in Courtroom 5 of the Honorable Harry C. Westover, Judge of said court, on the 17th day of February, 1958, at 10:00 a.m. or as soon thereafter as counsel may be heard.

Dated: This 7th day of February, 1958.

/s/ WILLIAM H. BRAWNER,
Attorney for Plaintiff,
Gertrude L. Brawner. [28]

[Title of District Court and Cause.]

MOTION FOR SUMMARY JUDGMENT
(Plaintiff)

The plaintiff, Gertrude L. Brawner, now moves the court to enter judgment against the defendant, Pearl Assurance Company, Limited, a corporation, and in favor of said plaintiff and as grounds for said motion plaintiff states:

I.

It appears from the papers and pleadings on file herein and from certain documents introduced in evidence in this case, Defendant's Exhibit A, which were certified from the condemnation proceeding evidence, being case No. 658447, entitled County of Los Angeles vs. Anna Anderson, Gertrude L. Browner, et al., filed April 4, 1956, in the Superior Court of the State of California, in and for the County of Los Angeles, that:

(a) On the 22nd day of October, 1955, defendant, Pearl Assurance Company, Limited, a corporation, for a consideration issued to plaintiff its Policy of Insurance No. D1152238, a copy of which is attached to plaintiff's complaint marked Exhibit [29] "A" for identification and made a part thereof.

(b) Thereafter from time to time, for a paid premium, defendant continued said policy in full force and effect up to and including the 22nd day of October, 1958, agreeing to pay Gertrude L. Brawner for loss by fire to the limit thereof, to wit, the sum of \$7,500.00, together with loss of rental and other covenants as in said policy set forth.

(c) On or about the 4th day of February, 1957, plaintiff was the legal owner of those certain improved premises known as 125-127-127½ South Bunker Hill Avenue, Los Angeles, California. That on the 4th day of February, 1957, said improvements were destroyed by fire.

(d) That prior to filing complaint herein, to wit, on the 4th day of February, 1957, plaintiff duly reported said loss to defendant and demanded that they pay said loss as provided in said policy but that defendants have failed to pay said sum or any part thereof.

II.

That plaintiff herein entered into a stipulation for Judgment in said action No. 658447 with the County of Los Angeles which was filed in the records of said action on April 5, 1957, which said stipulation is designated as defendant's Exhibit "A" in this action and by reference incorporated in and made a part hereof. That said stipulation provided in part as follows:

(a) That the defendant, Gertrude L. Brawner, is the owner of the real property described in the complaint herein as Parcel 55-4 (said property being the location of the buildings insured under defendant's policy of fire insurance).

(b) That the market value of said real property, together with any and all improvements thereon, including any and all severance damage which may be caused to other properties owned by said defendant by the taking thereof, is the sum of [30] \$26,400.00.

(c) That the plaintiff may have an interlocutory judgment without further notice to said defendant as to the real property finding and determining that the public interest and necessity require the acqui-

tion of the fee simple title in and to said real property for the public purposes set forth in the complaint herein and that said real property has not heretofore been appropriated to any public use.

(d) That upon the payment to the defendant, Gertrude L. Brawner, or into court for her benefit, of the total sum of \$26,400.00, less the amount, if any, of delinquent taxes, penalties, and costs, plaintiff, County of Los Angeles may have, without further notice to said defendant, a final order of condemnation vesting in the plaintiff the fee simple title to said real property for the public purposes set forth in the complaint herein.

III.

That on April 5, 1957, more than one year after the filing of said action, pursuant to said stipulation in said action No. 658447, interlocutory judgment was entered in favor of the County of Los Angeles and against the defendant therein, Gertrude L. Brawner (said interlocutory judgment being designated herein as defendant's Exhibit "A"), which said judgment provided in part as follows: Now, Therefore, in accordance with said stipulation, records and files herein, and the court being fully advised in the premises, it is hereby found and determined:

(a) That the defendant, Gertrude L. Brawner, is the owner of the real property described in the complaint herein as Parcel 55-4.

(b) That the market value of said real property, together with any and all improvements thereon, including any and all severance damage which may be caused to the remainder of the said real property by the taking thereof is the sum of \$26,400.00. [31]

It Is Therefore Ordered, Adjudged and Decreed that the plaintiff, County of Los Angeles, shall take for the uses set forth in the complaint the fee simple title in and to said real property and that a final order of condemnation may be entered herein vesting in the plaintiff the fee simple title in and to said real property for the public purposes set forth in said complaint upon payment by the plaintiff of the following sum in the manner indicated, or into court for the benefit of the person named to be disbursed by the clerk thereof in accordance herewith: To: Gertrude L. Brawner—\$26,400.00.

IV.

That Gertrude L. Brawner, as found and determined in said condemnation judgment hereinabove set forth, at all times mentioned therein and until the payment of said sum of \$26,400.00, on the 12th day of April, 1957, pursuant to California Civil Code, Section 1253, and until final judgment was entered in said condemnation action, was the legal owner in fee simple of said property upon which were located the premises destroyed by fire on February 4, 1957, insured under defendant Pearl Assurance Company, Limited, a corporation, policy No. D1152238.

V.

That defendant's, Pearl Assurance Company, Limited, a corporation, policy No. D1152238 was an open California Standard Form Fire Insurance Policy and at all times mentioned herein was in full force and effect. On the date of said fire, February 4, 1957, plaintiff Gertrude L. Brawner, legal owner thereof, became entitled to indemnification for loss sustained pursuant to California Insurance Code Section 2051.

VI.

This motion will be made upon all the pleadings, papers, files, authorities and exhibits on file herein, upon the Affidavit of William H. Brawner served and filed herewith and upon any [32] affidavits and points and authorities which may hereafter be served and filed prior to the hearing of this motion.

Dated at Los Angeles, California, this 7th day of February, 1958.

/s/ WILLIAM H. BRAWNER,
Attorney for Plaintiff,
Gertrude L. Brawner.

Receipt of copy acknowledged.

[Endorsed]: Filed February 10, 1958. [33]

[Title of District Court and Cause.]

AFFIDAVIT IN SUPPORT OF MOTION
FOR SUMMARY JUDGMENT
(Plaintiff)

State of California,
County of Los Angeles—ss.

William H. Brawner, being first duly sworn, deposes and says:

That at all times herein mentioned he was and now is an attorney at law duly admitted to practice in all counties of the State of California and admitted to practice as an attorney in the above-entitled court.

That your affiant herein at all times during the pendency of Condemnation Action No. 658447, in the Superior Court of the State of California, in and for the County of Los Angeles, entitled County of Los Angeles vs. Anna Anderson, et al., filed April 4, 1956; that your affiant herein did personally represent the defendant, Gertrude L. Brawner, in said last-mentioned action in connection with Parcel No. 55-4. [35]

That in said aforementioned action your affiant herein did cause to be prepared and filed in said proceeding an answer to Complaint in Eminent Domain wherein it is alleged that the property belonging to said defendant, Gertrude L. Brawner, is improved and of a value of not less than \$75,000.00.

That a certified copy of said Answer is attached to this affidavit and made a part hereof the same as though set forth in full at this portion of this affidavit.

That the improvements upon said Parcel 55-4 hereinabove referred to consisted of a 14-room dwelling operated as an apartment house and that said improvements were destroyed by fire on February 4, 1957. That your affiant personally conducted the negotiations with the County Counsel of the County of Los Angeles for the settlement of said condemnation action and at no time prior to said loss did said defendant, Gertrude L. Brawner, or your affiant acting on her behalf, agree to accept from the County of Los Angeles any sum less than the amount set forth in said Answer hereinabove referred to, to wit: \$75,000.00.

That subsequent to said fire and after the destruction of the improvements on said premises your affiant did negotiate with and conclude a settlement with the County of Los Angeles wherein said County of Los Angeles did, on April 12, 1957, by judgment of condemnation, acquire the real property described as Parcel 55-4 and the then remaining improvements on said premises after the loss by fire hereinabove referred to.

That said judgment decreed that Gertrude L. Brawner was at all times mentioned in said proceeding, and had been and was on April 12, 1957, the legal owner of said property.

That affiant knows of his personal knowledge and therefore alleges that at no time did the said defendant, Gertrude L. Brawner, or anyone in her behalf receive payment or value in money or otherwise for the premises destroyed by fire and covered by the fire insurance policy upon which the above-entitled action is prosecuted. [36] That at all times up to the entry of the decree of condemnation the said Gertrude L. Brawner was the owner of the real property and improvements thereon in fee simple and no equitable interest of any kind or character were outstanding or existed as against said property.

That at all times mentioned and at the time of the destruction of said premises by fire on February 4, 1957, the said Gertrude L. Brawner was the legal owner of and as such had an insurable interest in the improvements on said real property hereinabove referred to and said policy of Pearl Assurance Company, Limited, a corporation, was in full force and effect and by reason of said fire the said Gertrude L. Brawner was entitled to receive the sum of \$7,500.00 for the destruction of said premises together with the sum of \$150.00 for loss of rentals, together with interest thereon at the rate of 7% per annum from February 4, 1957, to date of payment.

That said stipulation entered into by and between Gertrude L. Brawner and the County of Los Angeles upon which interlocutory judgment was entered in her favor in the sum of \$26,400.00 was based upon the value of the property at the time said judgment was entered and only for the prop-

erty actually taken as provided by statute which was subsequent to the destruction by fire of the improvements insured by the defendant herein, Pearl Assurance Company, Limited, a corporation.

Said County of Los Angeles knew at the time said stipulation for Judgment was entered that said property had been destroyed by fire and accepted and paid for said fee simple title from defendant, Gertrude L. Brawner, in the then existing condition of the property involved.

That said sum so paid by Condemnor on April 12, 1957, was for the property "actually taken" by Condemnor at the time of taking and was taken pursuant to C.C.P. 1249 and C.C.P. 1253. That no part of said sum was paid by Condemnor for the non-existing improvements which had been destroyed by fire on February 4, 1957.

Defendant, Pearl Assurance Company, Limited, a corporation, [37] admits liability under their policy to plaintiff insured for certain losses incurred by fire, to wit, the sum of \$150.00 for loss of rental. In so doing they admit complete liability for all loss.

That the loss by fire occurred on February 4, 1957, and under the open policy here involved, the measure of indemnity under the policy is the expense to the insured of replacing the thing lost or injured in its condition at the time of injury, such expense being computed as of the time of the commencement of the fire as provided in the Insurance Code of California, Section #2051.

It is the position of plaintiff that she is entitled to judgment for the value of the insured property destroyed by fire to the extent of such loss as a matter of law.

However, if it be found that she is not so entitled to recovery as a matter of law there then exists an issue as to whether or not at the time the condemnation judgment was entered it included payment for the destruction of the insured property two months previous, which said property was never actually taken by the Condemnor, County of Los Angeles.

That a controversy exists as to whether or not plaintiff, Gertrude L. Brawner, received any compensation whatever for the property destroyed by fire from the Condemnor, County of Los Angeles.

Dated: February 7, 1958.

/s/ WILLIAM H. BRAWNER.

Subscribed and sworn to before me this 7th day of February, 1958.

[Seal] /s/ CARL G. CRAMOLINE,
Notary Public in and for the County of Los Angeles, State of California.

My Commission Expires February 27, 1959. [38]

In the Superior Court of the State of California
in and for the County of Los Angeles

No. 658447

COUNTY OF LOS ANGELES, a Body Corporate
and Politic,

Plaintiff,

vs.

ANNA ANDERSON, GERTRUDE L. BRAW-
NER, et al.,

Defendants.

ANSWER TO COMPLAINT
IN EMINENT DOMAIN

Comes now the defendant, Gertrude L. Brawner,
and answering complaint herein for herself alone
and for no other defendant, admits, denies and al-
leges as follows:

I.

This answering defendant admits that at all times
mentioned herein she has been and now is a married
woman and the owner in fee simple, as her separate
property, of that certain real estate described in
said complaint on Page 9 thereof as follows:

Parcel 55-4:

Part A:

Lot 12, Block "J," Mott Tract, in the City of Los
Angeles, County of Los Angeles, State of California,
as shown on map recorded in Book 1, page 489 of
Miscellaneous Records, in the office of the recorder
of said County.

Excepting therefrom the southeasterly 20 feet
thereof within [39] the lines of Bunker Hill
Avenue.

Part B:

That portion of the southeasterly 15 feet of Hope Street, vacated by Los Angeles City Ordinance No. 7608, New Series, which lies northwesterly of and adjoins the northwesterly line of above-described Lot 12.

This answering defendant alleges that said property is free and clear of all encumbrances except such governmental assessments, taxes or liens as may be currently of record.

II.

Plaintiff further alleges that said property is improved and of a value of not less than Seventy-five Thousand Dollars (\$75,000.00).

III.

That this defendant has not sufficient information or belief to enable her to answer the allegations of said complaint not herein expressly admitted and basing her denial on said ground denies generally and specifically each and every allegation therein contained and set forth.

/s/ WILLIAM H. BRAWNER,
Attorney for Defendant
Gertrude L. Brawner.

Receipt of copy acknowledged.

[Endorsed]: Filed November 15, 1956, Superior Court.

[Endorsed]: Filed February 10, 1958. [40]

[Title of District Court and Cause.]

PLAINTIFF'S OPPOSITION TO DEFEND-
ANT'S PROPOSED FINDINGS OF FACT
AND CONCLUSIONS OF LAW

Comes now the plaintiff, Gertrude L. Brawner, appearing by her counsel, William H. Brawner, and files opposition to the proposed Findings of Fact and Conclusions of Law by defendant on the following grounds, and in particular to Paragraph IV thereof, as follows:

That said proposed Findings are contrary to the facts of this case and contrary to law in that it appears from the papers, pleadings and files of this action that the alleged value of plaintiff's property prior to the fire, in condemnation action Case No. 658447, was of the value of \$70,000.00 as of the date of filing thereof on April 4, 1956; that the insured improvements thereon were destroyed by fire on February 4, 1957.

That pursuant to stipulation between plaintiff herein, Gertrude L. Brawner, and the plaintiff in said condemnation action, County of Los Angeles, the property actually taken by Condemnor after the fire and at the time said judgment was entered was of [42] the value of \$26,400.00. It also appears from said judgment entered in said condemnation action on April 5, 1957, that Gertrude L. Brawner was on said date and at all times subsequent to April 4, 1956, had been the fee simple legal owner of said property. It further appears that said Ger-

trude L. Brawner continued as the fee simple legal owner of said property as decreed in said judgment (Defendant's Exhibit A) until payment in full was made by the County on April 12, 1957, at which time the fee simple title of Gertrude L. Brawner was transferred to the County of Los Angeles, State of California, pursuant to Civil Code Section 1253, which said section provides in part "when payments have been made * * * the court must make a final order of condemnation which must describe the property condemned and the purposes of such condemnation. A copy of the order must be filed in the office of the recorder of the County, and thereupon the property described therein shall vest in the plaintiff for the purposes therein specified."

It further appears that pursuant to Section 2051 of the California Insurance Code that the loss pursuant to the policy of insurance was due and payable to the legal owner of the property at the time of the destruction of the property by fire, to wit, on the 4th day of February, 1957.

That it is not true that the value of the property condemned including the insured building was \$26,400.00 as of the date of commencement of the condemnation proceeding, to wit, April 4, 1956. That it is not true that the amount paid by the County to the insured, Gertrude L. Brawner, was paid without diminution because of the fire and destruction of the said insured property and there is no evidence to support such a finding. On the contrary, Condemnor took and paid only for the property

actually existent as of the date of taking as provided by statute.

Defendant's proposed Conclusions of Law are without [43] support for the reasons hereinabove stated and as further set forth in plaintiff's Points and Authorities filed herewith and by reference incorporated herein and made a part hereof.

Wherefore, plaintiff prays that defendant's proposed Findings of Fact and Conclusions of Law and the judgment proposed thereon be rejected and that judgment be granted plaintiff pursuant to the terms of the insurance policy for the sum of \$7,500.00 plus loss of rentals for which liability is admitted by the insurer under the terms of the policy in the sum of \$150.00.

Dated this 7th day of February, 1958.

/s/ WILLIAM H. BRAWNER.

Attorney for Plaintiff.

Receipt of copy acknowledged.

[Endorsed]: Filed February 10, 1958. [44]

[Title of District Court and Cause.]

MINUTES OF THE COURT

Present: Hon. Harry C. Westover, District Judge;
Counsel for Plaintiff: Ernest W. Pitney
(for William Brawner, Esq.);
Counsel for Defendants: Angus C. McBain.

Proceedings:

For (1) hearing motion of defendant Pearl Assurance Co., (filed 1/29/58), for summary judgment;

(2) hearing motion of plaintiff (filed 2/10/58), for summary judgment.

Court makes a statement.

Attorney Pitney makes a statement.

Court makes a further statement and grants motion of defendant for summary judgment.

Counsel for defendants to prepare findings and judgment.

JOHN A. CHILDRESS,

Clerk,

By /s/ MARY O. SMITH,

Deputy Clerk. [57]

[Title of District Court and Cause.]

PLAINTIFF'S OBJECTIONS TO DEFENDANT'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW AFTER MOTION FOR SUMMARY JUDGMENT

Comes now the plaintiff, Gertrude L. Brawner, appearing by her counsel, William H. Brawner and Ernest W. Pitney, and files her opposition to the proposed Findings of Fact and Conclusions of Law

after Motion for Summary Judgment by defendant on the following grounds as follows:

Point I.

That said Proposed Findings are not supported by the pleadings and the evidence and are contrary thereto.

I.

In support of Point I above and in furtherance thereof:

(a) It appears without conflict as shown by the pleadings, records and exhibits on file herein that plaintiff was at all times herein mentioned the legal owner in fee simple of the improved real property and the insured, under the policy sued upon. That said legal title of plaintiff was made a matter of judgment record in [58] condemnation proceeding Case No. 358447, as appears by Defs. Ex. A herein, until on or about April 12, 1957, approximately two months after the fire loss, at which time the fee simple title of Gertrude L. Brawner was transferred to the County of Los Angeles, State of California pursuant to Code of Civil Procedure 1253.

(b) That it appears without conflict from the pleadings and the evidence that the value of the property condemned, including the insured buildings, was stated by the insured to be in the sum of \$70,000.00 prior to the loss by fire.

(c) That said insured property was destroyed by fire on February 4, 1957. That insured on said date was the legal owner thereof.

(d) That there are no pleadings or evidence of any kind in the case which indicate that the value of the property condemned including the insured building was \$26,400.00 as of the date of the commencement proceeding, to wit, on April 4, 1956. That prior to the time of entry of Judgment by Stipulation in said condemnation proceeding, more than one year after April 4, 1956, the filing date of said action, and approximately two months after the fire, the parties stipulated for the entry of a judgment adjudging the value of the property as then existed to be the sum of \$26,400.00 and adjudging the insured to be the then legal owner. That the insured improvements had, prior to said date, to wit on February 4, 1957, been destroyed by fire and were non-existent.

(e) There is no evidence whatever in the record to sustain any part of Paragraph IV of defendant's proposed findings. [59]

(f) That Subindent (b) thereof is not only without evidence to support it but is misleading and untrue.

Subindent (c) of said Paragraph IV is without support in the record and is misleading and untrue.

II.

That said condemnation action No. 358447, entitled County of Los Angeles vs. Anna Anderson, Gertrude L. Brawner, et al., without delay caused by Defendant, Gertrude L. Brawner, was not

brought to trial within one year from date of the commencement thereof on April 4, 1956.

Point II.

That said Findings are not supported by law and are contrary thereto.

I.

A contract of insurance is purely a personal contract between the insured and the insurance company.

14 RCL 1365, Sec. 535;

John Weise, Inc. v. Notie Reed,
22 Tenn. appeals 90;

Vyn v. Northwest Casualty Co.,
47 Cal. 2d 89.

Cal. Ins. Code Section 250 provides:

“Except as provided in this article any contingent or unknown event, whether past or future, which may damnify a person having an insurable interest, or create a liability against him, may be insured against, subject to the provisions of this code.”

Cal. Ins. Code Section 2051 provides: Measure of Indemnity under open policy:

“Under an open policy, the measure of indemnity in fire insurance is the expense to the insured of replacing the thing lost or injured in its condition at the time of the injury, such expense being computed as of the time of the commencement of the fire.” [60]

Cal. Ins. Code Sec. 281 provides as follows:

“Every interest in property, or any relation thereto, or liability in respect thereof, of such a nature that a contemplated peril might directly damnify the insured, is an insurable interest.”

Cal. Ins. Code 301 provides:

“A change of interest in a subject insured, after the occurrence of an injury which results in a loss, does not affect the right of the insured to indemnity for the loss.”

In support of Point II herein plaintiff submits the authorities cited above and those heretofore filed in opposition to defendant's Motion for Summary Judgment and in support of plaintiff's Motion for Summary Judgment as though here set forth in detail and makes the same a part of these objections.

Dated: This 21st day of February, 1958.

WILLIAM H. BRAWNER and
ERNEST W. PITNEY,

By /s/ WILLIAM H. BRAWNER,
Attorneys for Plaintiff.

Receipt of copy acknowledged.

[Endorsed]: Filed February 25, 1958. [61]

[Title of District Court and Cause.]

PROPOSED FINDINGS OF FACT AND CON-
CLUSIONS OF LAW ON MOTION FOR
SUMMARY JUDGMENT

(Plaintiff)

The above matter having come on for hearing before the above-entitled Court on Motion for Summary Judgment by the plaintiff, Honorable Harry C. Westover, Judge presiding, the plaintiff appearing by her counsel, William H. Brawner and Ernest W. Pitney, and the defendant Pearl Assurance Company, Limited, a corporation, appearing by its counsel McBain & Morgan and Angus C. McBain, Esq., and the Court having granted said motion hereby makes the following Findings of Fact and Conclusions of Law:

Findings of Fact

I.

At the commencement of this action plaintiff, Gertrude L. Brawner was and has ever since been a citizen and resident of California and the defendant, Pearl Assurance Company, Limited, a corporation, was and ever since has been a corporation organized under the laws of and a citizen and resident of the Kingdom of Great [63] Britain and this action involves a controversy between citizens and residents of different states and the amount in dispute or controversy exceeds the sum and value of \$3,000.00.

II.

Said Pearl Assurance Company, Limited, a corporation, on October 2, 1955, for value received, duly issued its policy of Fire Insurance No. D1152238 in the California Standard Form prescribed, for fire insurance policies by laws of the State of California, insuring said plaintiff, Gertrude L. Brawner, against loss by fire to the building situate at 125-127-127½ South Bunker Hill Avenue, Los Angeles, California.

III.

That said property was destroyed by fire on February 4, 1957.

IV.

That said defendant, Pearl Assurance Company, Limited, a corporation, policy No. D1152238 was in full force and effect at the time said building was destroyed.

V.

The insured, Gertrude L. Brawner, duly reported the occurrence of said fire and the destruction of the building to said insurance company and demanded payment of the full amount of insurance on the building with legal interest thereon and of the sum of \$150.00 loss of rentals.

VI.

That the insured, Gertrude L. Brawner, was the owner in fee simple and in possession of said insured property on said February 4, 1957, and continued as such until April 12, 1957. That the loss

sustained by the fire became payable to the insured legal owner, Gertrude L. Brawner, at the time the fire occurred. That by reason of said fire and the destruction of said insured property, plaintiff Gertrude L. Brawner became entitled to payment for the loss sustained, to wit, the sum of \$7,500.00, plus the sum of \$150.00 per [64] loss of rentals.

VII.

That at the time said insured property was destroyed the entire property at the above-mentioned address was being condemned by the County of Los Angeles, a political subdivision of the State of California, in Case No. 658447, entitled County of Los Angeles vs. Anna Anderson, Gertrude L. Brawner, et al., in the Superior Court of the State of California, in and for the County of Los Angeles. That at the time of said fire the said County of Los Angeles had not taken possession of said property and no judgment of condemnation had been entered on said property and no award of any kind had been made by said condemning body to Gertrude L. Brawner.

VIII.

That subsequent to the loss sustained by said plaintiff and on April 5, 1957, judgment by stipulation was entered between County of Los Angeles and said Gertrude L. Brawner for the then value of said property, to wit, the sum of \$26,400.00. That thereafter and on the 12th day of April, 1957, payment was made by said County of Los Angeles to

said Gertrude L. Brawner of the amount of said interlocutory judgment and the fee simple title transferred by said Gertrude L. Brawner to the County of Los Angeles pursuant to law.

IX.

That said condemnation action entitled County of Los Angeles vs. Anna Anderson, Gertrude L. Brawner, et al., Los Angeles Superior Court Case No. 658447 was not brought to trial within one (1) year from date of filing said action.

X.

That the stipulation entered into by and between plaintiff and Gertrude L. Brawner in said condemnation action No. 658447 relates only to the real property and the then existing improvements. [65] It does not relate to nor purport to relate to the non-existing improvements theretofore destroyed by fire.

XI.

That defendant admits liability to the insured Gertrude L. Brawner as legal owner as of the date of the fire, to wit, February 4, 1957, with an insurable interest therein for loss of rentals under said policy.

XII.

That plaintiff, Gertrude L. Brawner, sustained loss by reason of the destruction of said building in the sum of \$7,500.00 and of rentals in the sum of \$150.00.

From the foregoing Findings of Fact, the court makes the following

Conclusions of Law

I.

That the defendant, Pearl Assurance Company, Limited, a corporation, have judgment herein in its favor and against the plaintiff, Gertrude L. Brawner.

II.

That this cause be dismissed as to defendants John Doe, Richard Roe, Doe One to Twenty, inclusive, and Black & White Company, a corporation.

Done in Open Court this day of February, 1958.

.....,
Judge.

Receipt of copy acknowledged.

Lodged February 28, 1958. [66]

—————

[Title of District Court and Cause.]

FINDINGS OF FACT AND
CONCLUSIONS OF LAW
(Proposed by Defendant)

The above matter having come on for hearing before the above-entitled Court, Honorable Harry C. Westover, Judge Presiding, on February 17, 1958, on motion for summary judgment made by the defendant, Pearl Assurance Company, Limited, and on motion for summary judgment made by the plaintiff, Gertrude L. Brawner; and the plaintiff appear-

ing by her counsel, William H. Brawner, Esq., and Ernest W. Pitney, Esq., and said defendant appearing by its counsel, Angus C. McBain, Esq., and the Court having denied said motion of plaintiff and having granted said motion of defendant, now, therefore, the Court hereby makes the following:

Findings of Fact

I.

At the commencement of this action plaintiff, Gertrude L. Brawner, was and has ever since been a citizen and resident of California and the defendant, Pearl Assurance Company, Limited, was and ever since has been a corporation organized under the laws of and a citizen and resident of the Kingdom of Great Britain and this action therefore involves a controversy between citizens and residents of different states and the amount in dispute or controversy exceeds, exclusive of interest and costs, the sum and value of \$3,000.00.

II.

Said defendant's policy of fire insurance, No. D1152238, in the California standard form prescribed for fire insurance policies by the laws of the State of California, insuring said plaintiff against loss by fire to the building situate at 125-127-127 1/2 South Bunker Hill Avenue, Los Angeles, California, was in force and effect at the time said building was destroyed by fire on February 4, 1957.

Plaintiff duly reported the occurrence of said fire and the destruction of the building to defendant and

demanding payment of the full amount of insurance on the building with legal interest thereon and of the sum of \$150.00 loss of rentals.

IV.

Plaintiff sustained no loss by reason of said fire and destruction (except for possible loss of rentals mentioned in Paragraph V of these findings) and had no insurable interest in the building at the time of its destruction for the following reasons:

a. At the time said building was destroyed the entire property at the above mentioned address was being condemned by the County of Los Angeles, a political subdivision of the State of California, in Case No. 658447 of the Superior Court of the State of California, in and for the County of Los Angeles;

b. Prior to the commencement of this action on the insurance policy, plaintiff, Gertrude L. Brawner, and said County stipulated and contracted in said condemnation action that the value of the entire property, including the insured building, was \$26,400.00 as of the date provided by the laws of the State of California for assessment of value in condemnation actions, to wit, the date of the commencement of the condemnation proceeding, April 4, 1956, and further stipulated that judgment should be entered in the condemnation action for said Gertrude L. Brawner against the County for the sum so agreed upon; and

c. Judgment was entered accordingly in said sum of \$26,400.00 on April 12, 1957, and plaintiff

was paid the full amount of said judgment by the County of Los Angeles prior to the commencement of the above-entitled action without reduction or diminution because of the aforesaid fire and destruction of the building.

V.

Plaintiff may have sustained loss of rentals by reason of the destruction of said building in the sum of \$150.00 but this presents no genuine issue for consideration by the Court because defendant has admitted liability for said claim and has tendered payment thereof to plaintiff and continues to admit liability and tender payment of said amount.

VI.

It appearing from the pleadings and other proceedings before the Court that no cause of action has been alleged, claimed or attempted against the defendants John Doe, Richard Roe, Doe One to Twenty, inclusive, Black & White Company, a corporation, the Court finds there is no genuine issue for consideration by the Court between said defendants and any of the other parties to this action and that this cause should, therefore, be dismissed as to said defendants. [70]

From the foregoing Findings of Fact, the Court makes the following:

Conclusions of Law

I.

That the defendant, Pearl Assurance Company, Limited, a corporation, have judgment herein in its

favor and against the plaintiff, Gertrude L. Brawner.

II.

That this cause be dismissed as to defendants John Doe, Richard Roe, Doe One to Twenty, inclusive, and Black & White Company, a corporation.

Done In Open Court this 25th day of February, 1958.

/s/ HARRY C. WESTOVER,
Judge.

Lodged February 24, 1958.

[Endorsed]: Filed February 25, 1958.

Entered: February 26, 1958.

In the District Court of the United States for the
Southern District of California, Central Division

No. 989-57—HW

GERTRUDE L. BRAWNER,

Plaintiff,

vs.

PEARL ASSURANCE COMPANY, LIMITED,
a Corporation, et al.,

Defendants.

JUDGMENT

(Proposed by Defendant)

The above matter having come on for hearing before the above-entitled Court, Honorable Harry

C. Westover, Judge Presiding, on February 17, 1958, on motion for summary judgment made by the defendant, Pearl Assurance Company, Limited, and on motion for summary judgment made by the plaintiff, Gertrude L. Brawner; and the plaintiff appearing by her counsel, William H. Brawner, Esq., and Ernest W. Pitney, Esq., and said defendant appearing by its counsel, Angus C. McBain, Esq., and the Court having denied said motion of plaintiff and having granted said motion of defendant, and having made findings of fact and conclusions of law herein, now, therefore,

It Is Ordered, Adjudged and Decreed that judgment be entered in favor of defendant, Pearl Assurance Company, Limited, a corporation, and against the plaintiff, Gertrude L. Brawner, and that said defendant recover its costs herein.

It Is Further Ordered that this cause be and it is hereby dismissed as to defendants John Doe, Richard Roe, Doe One to Twenty, inclusive, and Black & White Company, a corporation.

Done In Open Court this 25th day of February, 1958.

/s/ HARRY C. WESTOVER,
Judge.

Costs taxed, \$29.25.

Lodged February 24, 1958.

[Endorsed]: Filed February 25, 1958.

Entered: February 26, 1958. [73]

[Title of District Court and Cause.]

NOTICE OF APPEAL

To Defendant, Pearl Assurance Company, Limited,
a Corporation, and to Angus C. McBain and
McBain & Morgan, Its Attorneys:

Notice Is Hereby Given that Gertrude L. Brawner, plaintiff above named, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit from:

(1) The Judgment on Motion for Summary Judgment in favor of the defendant, Pearl Assurance Company, Limited, a corporation.

(2). From the Judgment denying Motion for Summary Judgment of plaintiff, Gertrude L. Brawner, and

(3) From the whole of the Final Judgment entered in this action on the 26th day of February, 1958.

Dated: This 25th day of March, 1958.

WILLIAM H. BRAWNER and
ERNEST W. PITNEY,

By /s/ WILLIAM H. BRAWNER,
Attorneys for Appellant,
Gertrude L. Brawner.

Affidavit of Service by Mail Attached.

[Endorsed]: Filed March 25, 1958.

[Title of District Court and Cause.]

CERTIFICATE BY CLERK

I, John A. Childress, Clerk of the above-entitled Court, hereby certify that the items listed below constitute the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit, in the above-entitled matter:

A. The foregoing pages numbered 1 to 80, inclusive, containing the original:

Petition for Removal of Cause to United States District Court, with copy of Superior Court Summons and Complaint.

Answer of Pearl Assurance Company.

Statement of Plaintiff's Case With Authorities.

Defendant's Notice of Motion for Summary Judgment.

Plaintiff's Notice of Motion for Summary Judgment.

Affidavit of William H. Brawner in Support of Motion for Summary Judgment (Plaintiff).

Plaintiff's Opposition to Defendant's Proposed Findings of Fact and Conclusions of Law.

Statement of Case With Authorities in Opposition to Defendant's Motion for Summary Judgment and in Support of Plaintiff's Motion for Summary Judgment.

Plaintiff's Objections to Defendant's Proposed Findings of Fact and Conclusions of Law After Motion for Summary Judgment.

Proposed Findings of Fact and Conclusions of Law on Motion for Summary Judgment (Plaintiff).

Findings of Fact and Conclusions of Law and Judgment, Entered 2/26/58.

Notice of Appeal.

Designation of Contents of Record on Appeal.

B. Minute Order of 2/17/58 re hearing on motions for summary judgments.

Also Exhibit "A."

I further certify that my fee for preparing the foregoing record, amounting to \$1.60, has been paid by appellant.

Dated: April 21, 1958.

JOHN A. CHILDRESS,
Clerk;

By /s/ WM. A. WHITE,
Deputy Clerk.

[Endorsed]: No. 15993. United States Court of Appeals for the Ninth Circuit. Gertrude L. Brawner, Appellant, vs. Pearl Assurance Company, Ltd., et al., Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed: April 22, 1958.

Docketed: April 24, 1958.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 15993

GERTRUDE L. BRAWNER,

Plaintiff and Appellant,

vs.

PEARL ASSURANCE COMPANY, LIMITED,
a Corporation,

Defendant and Appellee.

STATEMENT OF POINTS TO BE RELIED
UPON ON APPEAL AND DESIGNATION
OF RECORD TO BE PRINTED

To the Honorable Paul P. O'Brien, Clerk of the
United States Circuit Court of Appeals for the
Ninth Circuit, and to Angus C. McBain and
McBain and Morgan, Attorneys for Appellee:

Now comes Gertrude L. Brawner, the appellant
above named, and files this statement of points upon
which she intends to rely on the appeal herein, and
makes the following designation of the record which
she thinks necessary for the consideration thereof:

Points

I.

(a) The pleadings establish without conflict that
plaintiff, on February 4, 1957, was the owner of
certain improved real property.

(b) That said premises were insured by a fire policy for benefit of plaintiff, issued by defendants which at all times mentioned herein was in good standing and in full force and effect.

(c) That the insured premises were destroyed by fire on February 4, 1957.

(d) That demand for payment of loss sustained was duly made by plaintiff insured.

(e) That plaintiff at all times complied with and performed all of the terms and conditions of said insurance policy on her part required to be performed.

(f) That insured plaintiff, Gertrude L. Brawner, is entitled to judgment against defendant, Pearl Assurance Company, Limited, a corporation, under the terms of their said fire insurance policy as issued by them.

II.

(a) That the loss of plaintiff-owner insured, Gertrude L. Brawner, became a fixed liability fastened on insurer, Pearl Assurance Company, Limited, a corporation, under their said policy at the time of the destruction of the insured property by fire on February 4, 1957, and must be computed as of said date and insurer cannot escape its liability by reason of uncertain subsequent events which may or may not lead to a change of ownership.

(b) That a change of interest in said insured property after the occurrence of an injury which

results in a loss, does not affect the right of the insured to recover for the loss and will not enable the insurer to avoid its liability assumed under its policy.

III.

That the Findings of Fact of the trial court on Motion for Summary Judgment do not support the Conclusions of Law or the Judgment herein, but that upon said Findings of Fact appellant is entitled to Judgment as a matter of law.

Designation

Appellant believes that, for a proper consideration of the foregoing points, the entire record is necessary, and accordingly designates the whole thereof for printing.

Dated at Los Angeles, California, this 4th day of April, 1958.

WILLIAM H. BRAWNER, and
ERNEST W. PITNEY,

By /s/ WILLIAM H. BRAWNER,
Attorneys for Appellant,
Gertrude L. Brawner.

Affidavit of Service by Mail attached.

[Endorsed]: Filed April 28, 1958.

